No. 95-594

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

v.

FRANCES HOUSTON and KENNETH WOODBURY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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In opposing St. Paul Fire and Marine Insurance Company's Petition for Certiorari, Respondents Frances Houston and Kenneth Woodbury ("Respondents") emphasize that representations made by an insurance agent for Petitioner St. Paul Fire and Marine Insurance Company ("St. Paul") created a unique factual situation that allowed coverage for the insured Big Brothers/Big Sisters of Juneau, Inc.'s ("Big Brothers/Big Sisters") employee, Kenneth McQuade ("McQuade"), for his criminal acts of child abuse. Because this factual situation is so unusual, Respondents argue, there is no need for the Supreme

Court to examine this case. *See, e.g.*, Respondents' Brief in Opposition ("Opp.") at 6-7.

The Ninth Circuit, however, never would have been able even to consider these supposedly unique facts regarding representations made outside the insurance contract had it followed Alaska court decisions on collateral estoppel and *respondeat superior*, or perhaps more significantly, had it followed what the Ninth Circuit itself recognized to be established Alaska law with regard to insurance coverage for acts of intentional harm. Appendix to Petition ("Pet. App."), at 9a. The importance, and precedential value, of this case lies not in the Ninth Circuit's judgment on the scope of coverage available under the policy, but rather in the complete lack of deference to established state law it demonstrated in order to put itself in a position to make that judgment.

No coverage would have resulted had the Ninth Circuit followed Alaska trial court rulings that, as a matter of law, a child molester is not acting within the scope of duties when he commits criminal acts of child abuse. The Ninth Circuit reached the very opposite conclusion, knowing that the Alaska Supreme Court had refused to accept certification to review the relevant state trial court decisions. As Judge Singleton of the U.S. District Court for the District of Alaska recently noted, drawing on over twenty years of personal experience as an Alaska state judge and occasional Alaska Supreme Court justice:

> [t]he Alaska Supreme Court refuses to accept certification when, in its view, its prior decisions foreshadow an appropriate result. The Alaska Supreme Court has refused to accept certification in other declaratory judgment cases regarding coverage disputes when this Court saw an arguably novel issue and erred on the side of certification. but the supreme court was satisfied that the law was established.

Ryan v. Sea Air, Inc., 1995 U.S. Dist. LEXIS 15429 (D. Alaska, Oct. 16, 1995) (Singleton, J.) (footnote omitted).

In this case, the Alaska Supreme Court declined to accept Judge Singleton's certification of questions regarding the scope of the child molester McQuade's employment and the collateral estoppel effect of the underlying state court judgment that McQuade was not acting within the scope of his employment. The Alaska Supreme Court could have accepted certification if it felt it necessary to enunciate or clarify Alaska law applying to this case. The fact that it did not do so indicates that it was satisfied with the previous rulings on the issues.

As Judge Singleton recognized in his order for certification to the Alaska Supreme Court, established state law on collateral estoppel would have then resolved the litigation without further inquiry. Pet. App. at 25a. Contrary to Respondents' assertion (Opp. at 8), the Alaska Superior Court's ruling that, as a matter of law, there could be no *respondeat superior* liability for Big Brothers/Big Sisters collaterally estops the Ninth Circuit from revisiting the factual question of whether the child molester McQuade was acting within the scope of his duties when he molested Woodbury. Based on the Superior Court's ruling, McQuade could not have been acting within the scope of his employment. Based on the terms of the Big Brothers/Big Sisters liability policy, McQuade could only be covered if he was working within the scope of his duties. As the District Court in this case pointed out, the legal meaning of the terms "scope of duties" and "scope of employment" is the same. Pet. App. at 24a. Therefore, the Superior Court's determination, if properly accorded collateral estoppel effect, would necessarily have resulted in no coverage for McQuade's illegal acts of child abuse.

Yet the Ninth Circuit chose not to heed the Alaska Supreme Court's refusal to reconsider the law of *respondeat superior* for intentional acts of criminal child abuse and the collateral estoppel effect of the underlying state court decision on that matter. Instead, the Ninth Circuit

elected to avoid the relevant rulings and create its own "exception" to Alaska law, finding insurance coverage for acts of intentional harm in cases where there is an innocent victim. Despite Respondents' desire to downplay its significance, this "exception" clearly eviscerates the state rule against insurance coverage for intentional acts because *every* intentional act of harm for which an insured could be found liable will have an innocent victim. Although Respondents make much of the difference between liability and first-person property damage policies elsewhere in their brief, they ignore it when they argue that the Ninth Circuit's exception will not swallow Alaska's general rule against providing such coverage. (Opp., at 10)

Furthermore, the Ninth Circuit's holding applies to *all* insurance policies—not just the one here at issue. Thus, in any case where, as here, a liability policy is involved, the Alaska rule barring insurance coverage for acts of intentional harm has effectively been overruled by the Ninth Circuit. This utter lack of deference to state law and policy clearly is not the result that this Court intended when it held in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), that the circuit courts were to review *de novo* district court decisions as to state law.

Without clarification from this Court as to the proper means for determining state law, the Ninth Circuit and other federal courts of appeals will be free to overrule state law by continuing to create "exceptions" that have the purpose and effect of overruling or, at the very least, drastically altering, established state law. Substituting their own judgment for that of the state, they may continue to ignore dispositive lower state court holdings and rely instead on their own analysis of what the law should be. They may, as well, continue to vitiate the estoppel effect of state court judgments in order to reach results that are more to the liking of the federal court than the state courts. The Supreme Court should grant certiorari and

use this case to enunciate the standards federal courts should apply when determining state law.

Respectfully submitted,

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